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No. __-___

In the
Supreme Court of the United States

State of ALABAMA,

Petitioner,

v.

Sedina Lashay BRYANT,

Respondent.

On Petition For a Writ of Certiorari to the Supreme Court of Alabama

PETITION OF THE STATE OF ALABAMA FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a police officer who has reasonable suspicion pursue a fleeing suspect across the threshold of a private dwelling to accomplish a *Terry* stop?

2. Does a police officer have probable cause to pursue a fleeing suspect into an apartment, when the officer has circumstantial evidence – but not direct evidence, in the form of a statement by a bystander – that the suspect has committed a crime?

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PETITION FOR A WRIT OF CERTIORARI

The State of Alabama petitions this Court for a writ of certiorari to review and reverse the decision of the Supreme Court of Alabama in *Ex parte Bryant*, --- So. 2d ---, No. 1011111, 2002 WL 31002804 (Ala. Sep. 6, 2002) (Pet. App. 1a).

Bryant is the companion case to *Ex parte Moffitt*, --- So. 2d ---, No. 1001739, 2002 WL 254129 (Ala. Feb. 22, 2002) (Pet. App. 9a), in which the State of Alabama has already petitioned this Court for a writ of certiorari. That petition, filed August 29, 2002, and captioned *Alabama v. Moffitt*, No. 02-327, is currently pending before this Court. On October 28, this Court asked Moffitt to respond to the State's petition by November 27, 2002. A response has been filed.

The respondent in this case, Sedina Lashay Bryant, was the girlfriend of Kenneth Edward Moffitt. They were living together at the time. "Moffitt and Bryant were both convicted of unlawful possession of cocaine arising out of the same circumstances. An officer discovered and seized the cocaine pursuant to a warrantless entry into an apartment shared by Moffitt and Bryant." *Bryant*, 2002 WL 31002804, at *1 (Pet. App. 1a).

In separate appeals, the Alabama Court of Criminal Appeals upheld Moffitt's and Bryant's convictions, but the Supreme Court of Alabama reversed. *Moffitt*, 2002 WL 254129, at *3 (Pet. App. 13a); *Bryant*, 2002 WL 31002804, at *1 (Pet. App. 2a). The court ruled that the police lacked probable cause to enter the apartment shared by Moffitt and Bryant, even though (1) the police had received a report of shots fired in the area; (2) when the responding officer arrived at the scene, a group of people yelled for the responding officer to stop;

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(3) when Moffitt, who was standing in the group, saw the police officer, he ran away and into the apartment; (4) as Moffitt took flight, one individual in the group yelled "That's him!", "He's got a gun!"; and (5) the police officer did not know at the time whether Moffitt resided in the apartment or whether any other people were currently in the apartment and were in danger. (Later the police learned that the apartment belonged to Moffitt's girlfriend and that Moffitt was staying there at the time.) Because the police did not have direct evidence in the form of a statement by one of the bystanders that Moffitt was the one who had actually fired the earlier shots, the court ruled that the police lacked probable cause to pursue Moffitt into the apartment. *Moffitt*, 2002 WL 254129, at *2 ("There is no evidence indicating that anyone told [the police officer] that Moffitt had *fired* a gun") (emphasis in original) (Pet. App. 12a); *Bryant*, 2002 WL 31002804, at *1 (following *Moffitt*) (Pet. App. 2a).

In *Bryant*, the State argued that, even if the police did not have probable cause, they had reasonable suspicion that Moffitt had committed a crime, which permitted them to stop Moffitt under *Terry v. Ohio*, 392 U.S. 1 (1968), and to pursue Moffitt into the apartment to complete the investigative stop. A contrary result, the State contended, would allow any suspect to avoid a lawful investigative stop simply by running into a dwelling that may not even belong to him. (In *Moffitt*, the State made this argument in its petition for rehearing but not in its merits brief.) The Supreme Court of Alabama did not address the *Terry* stop issue in either case. The court denied the State's petition for rehearing in *Moffitt* without opinion, and it reversed the conviction in *Bryant* for "the same reasons expressed in *Moffitt*," without even acknowledging the

State's *Terry* stop argument. *Bryant*, 2002 WL 31002804, at *1 (Pet. App. 2a).

In declining to address the *Terry* stop argument, the Supreme Court of Alabama implicitly added to a split among the lower courts on "whether law enforcement officers who have reasonable grounds for a *Terry* stop of a suspect in a public place may, in order to effect the stop, pursue a fleeing suspect across the threshold of a private dwelling." *Hopkins v. State*, 661 So. 2d 774, 778 (Ala. Crim. App. 1994) ("There is a split of authority on the question"). As argued by the State in its petition for certiorari in *Moffitt*, moreover, the rulings of the Supreme Court of Alabama in both *Moffitt* and *Bryant* add to a disturbing trend among state supreme courts of injecting a direct-evidence requirement into the "totality of the circumstances" test that this Court has prescribed for determinations of probable cause. These rulings conflict with the majority rule and unduly handcuff the police in the performance of their duties to apprehend suspects and protect the public. The police must be permitted to use their experience and instincts to draw inferences from the circumstances about whether a person has committed a crime or poses a threat to public safety. They will not be able to do their jobs if they must pause to gather evidence of the nature required by the Supreme Court of Alabama, before pursuing those who appear from all the circumstances to have committed or to be in the process of committing a crime.

For these reasons, the State of Alabama petitions this Court to grant certiorari in both *Moffitt* and *Bryant*, consolidate the cases, and accept briefing and argument in both cases together.

DECISIONS BELOW

The decision of the Alabama Court of Criminal Appeals affirming Bryant's conviction is an unpublished memorandum opinion. *Bryant v. State*, No. CR-00-1272 (Ala. Crim. App. Jan. 25, 2002) (Pet. App. 3a). The decision of the Alabama Supreme Court reversing Bryant's decision will be published and can be found at *Ex parte Bryant*, --- So. 2d ---, No. 1011111, 2002 WL 31002804 (Ala. Sept. 6, 2002) (Pet. App. 1a).

STATEMENT OF JURISDICTION

The Supreme Court of Alabama issued its opinion reversing Bryant's conviction on September 6, 2002. The State did not petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides in pertinent part:

> The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

STATEMENT OF THE CASE

1. On June 10, 2000, during the hours of 6:00 p.m. to 6:00 a.m., Officer Jerry Lynn Watkins of the Dothan Police Department was on duty. (R. 48.[1]) Shortly before 3:20 a.m., he received a dispatch stating that shots had been fired at the Johnson Homes apartment complex. (R. 48.) When Watkins arrived at the scene, he saw a group of people standing outside the apartment buildings arguing. (R. 48.) As Watkins got out of his car, he saw one of the individuals, Kenneth Edward Moffitt, "take off running" from the group. (R. 50.) The defendant, Sedina Lashay Bryant, was in the group and, along with another man, began yelling: "There he goes!" (R. 50.) Watkins and another officer immediately gave chase. (R. 50.) Moffitt ran into the back door of one of the apartments. (R. 50.) Watkins sent the auxiliary officer to cover the front door of the apartment while he waited at the back. (R. 50-51.) Watkins had no idea whether anyone else was in the apartment with Moffitt. (R. 73.) Moffitt attempted to escape through the front door but had slammed it shut when he saw the officer waiting there. (R. 51-52.)

Backup arrived in approximately three minutes. (R. 57.) Meanwhile, another individual informed Watkins that Moffitt had a gun. (R. 51-52.) When backup arrived, Watkins and another officer entered through the back door and began to search the apartment. While looking for Moffitt, the officers saw in plain view several pieces of crack cocaine in the master bedroom lying on top of the TV, on both sides of the TV, and on the TV stand. (R. 52.) Continuing to

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[1] "R. __" refers to a page in the record from the trial of this case.

search for Moffitt, Watkins found, in the next bedroom, a three- or four-year-old child sitting on the bed. (R. 52-54.) The officers found Moffitt hiding under the bed and arrested him. (R. 52-54.) After the officers learned that the apartment belonged to Bryant, they arrested and charged her, too.

2. In August 2000, a Houston County Grand Jury indicted Moffitt and charged him with unlawful possession of a controlled substance, in violation of Section 13A-12-212 of the Code of Alabama (1975). Following a jury trial, Moffitt was convicted. On May 18, 2001, the Alabama Court of Criminal Appeals affirmed Moffitt's conviction in an unpublished memorandum opinion. *Moffitt v. State*, No. CR-00-0574 (Ala. Crim. App. May, 18, 2001) (Pet. App. 17a).

On February 22, 2002, in a 6-3 decision, the Supreme Court of Alabama reversed. *Ex parte Moffitt*, No. 1001739, 2002 WL 254129 (Ala. Feb. 22, 2002) (Pet. App. 9a). The court held that the police did not have probable cause to follow Moffitt into the apartment because there was "no evidence to indicate that [they] were given any information concerning the identity of the reported shooter." *Id.* at *2 (Pet. App. 12a). There was "no evidence indicating that anyone told Watkins that Moffitt had *fired* a gun." *Id.* (Pet. App. 12a) (emphasis in original). The court rejected the State's argument that Officer Watkins could have inferred the identity of the shooter from the totality of the circumstances – the "shots fired" dispatch, Moffitt's flight, the information from bystanders that Moffitt currently possessed a gun. "[T]his argument fails to acknowledge the fact that no one informed Watkins that Moffitt had fired a gun at another person or, for that matter, that he had fired a gun under any circumstance." *Id.* at *2 (Pet. App. 12a-13a). "While

there was a basis for a reasonable suspicion that Moffitt was in possession of a gun, the mere possession of a gun is not a crime, and there is not evidence that Watkins was aware of any fact indicating that it was unlawful for Moffitt, in particular, to possess a gun." *Id.* (Pet. App. 13a). "Moffitt had not been accused by anyone of committing any crime before Watkins made the warrantless entry into the apartment." *Id.* (Pet. App. 13a).

In her dissent, Justice Stuart criticized the majority for distorting the concept of probable cause. "Viewing the evidence at the time of the incident in question rather than with the benefit of hindsight," she said, Officer Watkins "did not know when he pursued Moffitt whether he was faced with a menacing or a reckless endangerment (both misdemeanors) or with an attempted murder (a felony)." *Id.* at *4 (Pet. App. 15a-16a). "Moffitt's flight from the scene when the police officer arrived was evidence indicating that he had committed some offense." *Id.* (Pet. App. 16a). "Watkins was informed that Moffitt had a gun, so he had reason to believe [Moffitt] was dangerous" when he followed Moffitt into the apartment. *Id.* (Pet. App. 16a). "Before he entered, Officer Watkins could not know who might be inside and what Moffitt might do to anyone who was inside." *Id.* (Pet. App. 16a). "Once he was inside and saw contraband in 'plain view,'" Justice Stuart concluded, "his seizure of it was lawful." *Id.* (Pet. App. 16a).

On March 8, 2002, the State applied to the Supreme Court of Alabama for rehearing. In its rehearing application, the State argued for the first time that the police had reasonable suspicion that Moffitt had committed a crime, entitling them to pursue Moffitt into the apartment to complete an

investigative stop. On May 31, 2002, the Supreme Court of Alabama denied the State's application without opinion.

On August 29, 2002, the State petitioned this Court for a writ of certiorari, seeking review of Alabama Supreme Court's decision in *Moffitt*. The State requested that this Court review the ruling that a police officer did not have probable cause to pursue a fleeing suspect into an apartment, because the officer lacked direct evidence – in the form of a statement by a bystander – that the suspect had committed a crime. That petition is currently pending. *Alabama v. Moffitt*, No. 02-327. On October 28, 2002, this Court asked Moffitt to respond to the State's petition by November 27, 2002. A response has been filed.

3. In September 2000, one month after Moffitt, Bryant was also indicted by a Houston County Grand Jury for unlawful possession of a controlled substance, in violation of Ala. Code § 13A-12-212. (C. 5-6.[2]) Bryant was tried separately from Moffitt and convicted. The trial court sentenced Bryant to one year and one day in prison and imposed various fines, fees, and assessments. The court suspended Bryant's sentence, however, and placed her on three years probation. (C. 30-31.)

On January 25, 2002, the Alabama Court of Criminal Appeals affirmed Bryant's conviction in an unpublished memorandum opinion. *Bryant v. State*, No. CR-00-1272 (Ala. Crim. App. Jan. 25, 2002) (Pet. App. 3a). On February 8, 2002, Bryant filed an

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[2] "C. __" refers to a page in the clerk's record on appeal.

application for rehearing, which the Court of Criminal Appeals overruled on February 22, 2002.

On March 8, 2002, Bryant petitioned the Supreme Court of Alabama for a writ of certiorari, relying upon the court's decision two weeks earlier in *Moffitt*. On September 6, the court granted the petition and reversed Bryant's conviction, again by a 6-3 margin. *Ex parte Bryant*, No. 1011111, 2002 WL 31002804 (Ala. Sep. 6, 2002) (Pet. App. 1a). This time, as it had done in the Alabama Court of Criminal Appeals, the State argued in its merits brief not only that *Moffitt* was incorrectly decided – that the police did have probable cause to pursue Moffitt into the apartment – but also that the police had reasonable suspicion that Moffitt had committed a crime and thus were entitled to pursue him into the apartment to complete an investigative stop under *Terry v. Ohio*, 392 U.S. 1 (1968). The Supreme Court of Alabama did not even acknowledge the State's *Terry* stop argument, however. Instead, the court simply cited its decision in *Moffitt*. "For the same reasons expressed in *Moffitt*, we conclude that the trial court erred in denying Bryant's motion to suppress the cocaine evidence, and that, therefore, the Court of Criminal Appeals erred in affirming the trial court's judgment." *Bryant*, 2002 WL 31002804, at *1 (Pet. App. 2a). The court did not elaborate further on its decision.

The State did not seek rehearing and today files this petition asking this Court to review and reverse the decision in *Bryant*. This petition – because it seeks review of an opinion that expressly relied upon *Moffitt* – raises the same question as presented by the State's petition for certiorari in *Moffitt*. In addition, this petition presents the question whether reasonable suspicion, sufficient to justify a *Terry* stop, permits the

police to pursue a fleeing suspect into a private dwelling.

REASONS FOR GRANTING THE PETITION

I. There is a Split of Authority on the Issue Whether Reasonable Suspicion Warrants the Pursuit of a Fleeing Suspect Across the Threshold of a Private Dwelling.

In its merits briefs before both the Alabama Court of Criminal Appeals and the Supreme Court of Alabama, the State argued that Officer Watkins had a reasonable suspicion sufficient to warrant stopping Moffitt under *Terry v. Ohio*, 392 U.S. 1 (1968), and that he was therefore entitled to pursue Moffitt into the apartment to complete the investigative stop. The Supreme Court of Alabama ignored the issue, however, thereby implicitly joining one side of a split among the lower courts on whether reasonable suspicion warrants the pursuit of a fleeing suspect across the threshold of a private dwelling. This Court should grant certiorari to resolve this split.

"There is a split of authority on the question whether law enforcement officers who have reasonable grounds for a *Terry* stop of a suspect in a public place may, in order to effect the stop, pursue a fleeing suspect across the threshold of a private dwelling." *Hopkins v. State*, 661 So. 2d 774, 778 (Ala. Crim. App. 1994); *see also State v. Akins*, 2000 WL 271986, at *4 (Minn. Ct. App. Mar. 14, 2000) (unpublished opinion) (the issue has "elicited a substantive split of authority"). As noted by the Alabama Court of Criminal Appeals in *Hopkins*, Professor LaFave has opined that the police may pursue a suspect into a private residence in order to complete an otherwise valid *Terry* stop. 3 Wayne R. LaFave, *Search and*

Seizure § 9.2(d) at 44-46 (3d ed. 1996). Professor LaFave agrees with the position first taken by the D.C. Court of Appeals in *Edwards v. United States*, 364 A.2d 1209 (D.C. 1976), *aff'd on the basis of probable cause*, 379 A.2d 976 (D.C. 1977) (reh'g en banc), in which the court addressed the question

> Whether a police officer who confronts a citizen on a public street late at night lacking probable cause to arrest him, but having articulable grounds to suspect him to be engaged in on-going criminal activity, may pursue him from the street into private premises when he runs in response to the officer's request to stop and answer questions.

Id. at 1210-11. The D.C. Court of Appeals answered the question in the affirmative, relying upon this Court's ruling in *United States v. Santana*, 427 U.S. 38 (1976), that a "suspect may not defeat an arrest which has been set in motion in a public place . . . by the expedient of escaping to a private place." *Id.* at 43. "We read the gravamen of . . . *Santana*," said the D.C. Court of Appeals, "to be that when a citizen has knowingly placed himself in a public place and valid police action is commenced in that public place, the citizen cannot thwart that police action by then fleeing into a private place." 379 A.2d at 1214.

A number of other courts, including federal courts of appeals and a state court of last resort, have reached the same or similar conclusions. *United States v. Pace*, 898 F.2d 1218, 1228-29 (7th Cir. 1990) (officer's entry into curtilage was reasonable considering reasonable suspicion and the suspect's "evasive action upon discovering he was being followed"); *State v. Penas*, 263 N.W.2d 835, 837-38 (Neb. 1978) (citing *Edwards* for proposition that "when a citizen has knowingly placed

himself in a public place, and valid police action is commenced in that public place, the citizen cannot thwart police actions by fleeing into a private place"); *Harbin v. City of Alexandria*, 712 F. Supp. 67, 71-72 (E.D. Va. 1989) (*Terry* stop need not end when suspect walks from porch into house), *aff'd*, 908 F.2d 967 (4th Cir. 1990).[3]

The Supreme Court of Alabama, by reversing Bryant's conviction without even addressing the State's *Terry* stop argument, has implicitly reached the opposite conclusion. The Utah Court of Appeals, although not a state court of last resort, has explicitly reached the opposite conclusion. In *State v. Beavers*, 859 P.2d 9 (Utah App. 1993), two police officers were waiting outside the door of an apartment when the suspect opened the door and stepped into the hall. "As soon as he saw the officers, he exclaimed 'Oh, shit' and

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[3] *See also Alto v. City of Chicago*, 863 F. Supp. 658, 661-62 (N.D. Ill. 1994) ("an officer who stops a person because of a reasonable, articulable suspicion of criminal activity need not terminate the stop merely because the suspect flees to his home") (citations omitted); *United States v. Gomez*, 495 F. Supp. 992, 1005 (S.D.N.Y. 1979) ("the agents' continued pursuit of the suspects after they retreated and slammed the door did not contravene the Fourth Amendment"); *People v. Rivera*, 598 N.E.2d 423, 427 (Ill. App. 2d 1992) ("the police, in certain limited circumstances, may be authorized to make a warrantless entry into a private premises for the purpose of effectuating a *Terry* stop provided [they] have a lawful basis to stop a suspect in a public place and the suspect reacts by suddenly fleeing to a private sanctuary, thereby thwarting any opportunity to conduct the detention at a public location"); *Jackson v. Commonwealth*, 2000 WL 274162, at *3 (Va. Ct. App. Mar. 14, 2000) ("The Fourth Amendment does not require police to desist from effecting an otherwise valid *Terry* stop simply because the suspect moves from his porch to the living room through a still opened door") (unpublished opinion).

stepped back across the threshold about a half an arm length into the apartment." *Id.* at 11. One police officer reached out, grabbed the suspect by the shoulder, and flipped him over into a prone position. Through the open door, the police saw three people in the apartment, one of whom began fumbling for something in a pile of clothes and the other two of whom began to flee. Fearing for their safety, the police entered the apartment and arrested all the occupants. On appeal, the issue before the court was whether the police were justified in detaining the suspect, after he stepped out into the hall but then attempted to escape back into the apartment, on the basis of reasonable suspicion alone. The Utah Court of Appeals engaged in a lengthy discussion of the authorities on both sides of the issue – including Professor LaFave's treatise and the seminal D.C. Court of Appeals' decision in *Edwards* – and ultimately "reject[ed] the State's argument that police can enter a dwelling without a warrant on the basis of reasonable suspicion." 859 P.2d at 17. "An extension of the *Terry* doctrine to warrantless entries of private premises is contrary to Fourth Amendment principles." *Id.*

The Utah Court of Appeals placed heavy reliance on two decisions by a federal court of appeals and a state supreme court, in which the courts flatly declared that a *Terry* stop cannot extend into a private residence. *United States v. Tobin*, 890 F.2d 319, 327 (11th Cir. 1989) ("The *Terry* analysis does not apply to intrusions into the home . . . because an individual's residence enjoys special protection under the Fourth Amendment"), *vacated*, 902 F.2d 821 (11th Cir. 1990) (en banc) (granting rehearing), *replaced*, 923 F.2d 1506, 1511 (11th Cir. 1991) (en banc) ("Reasonable suspicion cannot justify the warrantless search of a house"); *State v. Davis*, 666 P.2d 802, 812 (Or. 1983)

(en banc) ("we have never held, and decline to hold here, that a reasonable suspicion sufficient to support a temporary detention of a citizen during investigation suffices to legalize entry into one's premises without probable cause, without a warrant, without exigent circumstances and over one's protests"). It should be noted that, in both *Tobin* and *Davis*, the police had not first attempted to detain the suspect outside the house and then pursued the suspect into the house. Instead, the police had attempted to question the suspect while the suspect was still inside the house and then had followed the suspect inside when the suspect did not cooperate. On their facts, therefore, these cases may be harmonized with the majority rule of *Edwards*, in that the police arguably had not initiated a valid investigative stop in the first place and so could not be said to be pursuing a fleeing suspect when they entered the house. Nevertheless, the principles on which these cases rely are couched in broad enough terms that several lower courts, including the Utah Court of Appeals in *Beavers*, 859 P.2d at 16-17, the Alabama Court of Criminal Appeals in *Hopkins*, 661 So. 2d at 778-79, and the Minnesota Court of Appeals in *Akins*, 2000 WL 271986, at *3-*4, have interpreted them as creating a conflict with the majority rule of *Edwards*.

Questions of when an investigative stop begins and how far the police may pursue a suspect to complete the investigation are substantial and worthy of this Court's attention. This case squarely presents these questions. Because the questions have led to a split among courts of last resort, not to mention significant lower court confusion, this Court should grant the State's petition for a writ of certiorari.

II. Several State Courts of Last Resort, Including the Supreme Court of Alabama in This Case, Have Been Quietly Stiffening the Standard of Probable Cause To a Point Approaching the Quantum of Proof Required at Trial.

As noted, the Supreme Court of Alabama reversed Bryant's conviction based upon its previous decision in *Ex parte Moffitt*, No. 1001739, 2002 WL 254129 (Ala. Feb. 22, 2002) (Pet. App. 9a). On August 29, 2002, the State of Alabama petitioned this Court for a writ of certiorari in *Moffitt*, No. 02-327, asking this Court to consider whether the Alabama Supreme Court erred in holding that Officer Watkins did not have probable cause to pursue Moffitt into an apartment, because he lacked direct evidence – in the form of a statement by a bystander – that Moffitt had committed a crime. With the reversal of Bryant's conviction, based on *Moffitt*, the same question is presented here.

A. The courts of last resort in Alabama, Colorado, and Maryland have all departed from the majority rule that a finding of probable cause does not require direct evidence of guilt.

In its petition for certiorari in *Alabama v. Moffitt*, No. 02-327, the State argued that, in addition to the Supreme Court of Alabama, the Supreme Court of Colorado has also recently invalidated a search and seizure on the basis that the police did not have direct evidence that the suspect had committed a crime. *People v. King*, 16 P.3d 807, 815 (Colo. 2001) (invalidating the arrest of two individuals, despite an abundance of circumstantial evidence that they were growing marijuana, because the police "did not see the

defendants cultivating marijuana"). Two days before the State filed its petition in *Alabama v. Moffitt*, moreover, Maryland's highest court reversed a conviction for possession of cocaine, finding no probable cause to arrest "when [defendant] had not admitted ownership of the drugs." *Pringle v. State*, 805 A.2d 1016, 1019 (Md. 2002). These decisions effectively raised the level of proof required for probable cause from the "mere probability of criminal activity" to something approaching "beyond a reasonable doubt." These rulings conflict with those of most state and federal courts that have had no difficulty embracing this Court's directive to consider the totality of the circumstances and not let the presence or absence of direct evidence determine the entire question of probable cause.

1. As early as 1813, this Court made clear that "the term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation . . . . It imports a seizure made under circumstances which warrant suspicion." *Illinois v. Gates*, 462 U.S. 213, 235 (1983), *quoting Locke v. United States*, 7 Cranch. 339, 348, 3 L.Ed. 364 (1813). "[O]nly the probability, and not a prima facie showing, of criminal activity is the standard of probable cause." *Gates*, 462 U.S. at 235, *quoting Spinelli v. United States*, 393 U.S. 410, 419 (1969). Furthermore, in making a determination of probable cause,[4] "the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of

[4] The determination of probable cause for the issuance of a warrant for the search of a vehicle or a house is the same for both warranted and warrantless searches. *Draper v. United States*, 358 U.S. 307 (1959).

suspicion that attaches to particular types of non-criminal acts." *Gates*, 462 U.S. at 245 n. 13. In fact, "innocent behavior frequently will provide the basis for a showing of probable cause; to require otherwise would be to *sub silentio* impose a drastically more rigorous definition of probable cause than the security of our citizens demands." *Id.*

This Court has therefore held that probable cause analysis requires examination of *all* the facts known to law enforcement officers – the "totality of the circumstances." *Gates*, 462 U.S. at 230-231. The significance of a particular fact must be determined in the context of other facts known to the officer and cannot be established for all cases on a categorical basis. That rule is consistent not only with the reasonableness standard of the Fourth Amendment but with the practical realities and considerations of law enforcement. Probable-cause analysis requires consideration of "the whole picture" seen by the officer. *Ker v. California*, 374 U.S. 23, 33 (1963) (because "standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application," "[e]ach case is to be decided on its own facts and circumstances"); *cf. United States v. Cortez*, 449 U.S. 411, 417 (1981) ("the essence" of the reasonable suspicion test "is that the totality of the circumstances – the whole picture – must be taken into account").

2. The ruling in this case violates these principles by injecting a rigid requirement of direct evidence into the standard for probable cause. The Supreme Court of Alabama in *Moffitt* – and, therefore, in this case – held that Officer Watkins lacked probable cause to enter the apartment into which Moffitt had fled. The court based this holding on the fact that no one told Watkins

"that Moffitt had *fired* a gun," as opposed to merely possessing one. *Moffitt*, 2002 WL 254129, at *2 (Pet. App. 12a) (emphasis in original). "Moffitt had not been accused by anyone of committing any crime before Watkins made the warrantless entry into the apartment." *Id.* (Pet. App. 13a). In other words, Watkins did not have direct evidence, in the form of eyewitness testimony, that Moffitt had committed a crime. The court failed to explain whether it considered the totality of the other circumstances and whether those circumstances in combination gave rise to probable cause that Moffitt had committed or was about to commit a gun-related crime.

The Supreme Court of Alabama effectively held that a police officer chasing a fleeing suspect must pause to interview bystanders and obtain confirmation in the form of direct testimony that the fleeing suspect actually committed a crime. This Court has condemned so categorical an approach because it "encourag[es] an excessively technical dissection of informant's tips, with undue attention being focused on isolated issues that cannot sensibly be divorced from the other facts presented to the magistrate." *Gates*, 462 U.S. at 234-35. The court ignored this Court's admonition and swept aside the totality of the circumstantial evidence known to Officer Watkins – facts that would have led any reasonable observer to believe it probable that Moffitt had committed a crime. Not surprisingly, this myopic reasoning led to a nonsensical result.

In *People v. King*, 16 P.3d 807 (Colo. 2001), the Colorado Supreme Court similarly ruled that the police did not have probable cause to arrest two men suspected of marijuana cultivation, despite extensive circumstantial evidence indicating their involvement.

Unlike the Supreme Court of Alabama, the Colorado Supreme Court did note the absence of certain other circumstantial evidence (footprints in the marijuana garden, possession of cultivation tools by the defendants) that the court hinted might have given the police probable cause, *id.*, but the court made clear the priority it placed on the lack of direct evidence by its emphasis on this single fact: "The police did not see the defendants cultivating marijuana." *Id.* at 815. In fact, the Colorado Supreme Court distinguished another case in which it had upheld the arrest of a defendant for cultivation of marijuana on the ground that a police surveillance team in the other case had actually seen the defendant watering the marijuana plants. *King*, 16 P.3d at 815-16 (citing and distinguishing *People v. Boff*, 766 P.2d 646 (Colo. 1988)).

Most recently, the highest court in Maryland declared unconstitutional the arrest of a passenger of a car containing a large sum of cash and several individual packets of cocaine "based primarily upon an erroneous blending of the probable cause standard for an arrest and the sufficiency of evidence standard for a conviction." *Pringle*, 805 A.2d at 1034 (Battaglia, J., dissenting). A dissenting opinion summarized the information known to the police at the time of the arrest as follows:

> [T]he information known to the officer at the time of the arrest was that three men were traveling in a vehicle (a Nissan Maxima) around 3:00 am with a large stash of cash in the glove compartment and several plastic baggies of cocaine in the rear armrest. None of the men claim ownership of the drugs or money, yet the location of the drugs and money in the Nissan

> Maxima would lead a reasonable officer in similar circumstances to believe that the three men had joint constructive possession over the contraband.

Id. at 1035 (Battaglia, J., dissenting). Following the arrest, the defendant waived his *Miranda* rights and "acknowledged that the cocaine belonged to him, that he and his friends were going to a party in Westminster, and that he intended to sell it or 'Use it for sex.'" *Id.* at 1020.

The Court of Appeals of Maryland, however, determined that a finding of probable cause required much more. "[T]here was not probable cause to support the arrest of the petitioner in the car when he had not admitted ownership of the drugs." *Pringle*, 805 A.2d at 1019. In reaching this conclusion, the court focused on the element of "possession" and "devote[d] most of its attention to citing and discussing legal authority for issues involving the standard of legal sufficiency . . . , seemingly require[ing] police officers to consider whether the evidence gathered would be legally sufficient for a possession conviction *prior* to making the arrest." *Pringle*, 805 A.2d at 1034-35 (Battaglia, J., dissenting) (emphasis in original).

In short, like the Supreme Court of Alabama in this case, the Supreme Court of Colorado and the Court of Appeals of Maryland allowed the lack of direct evidence to override the combination of the circumstantial evidence gathered by the police prior to arresting the defendants. In so doing, they elevated the standard of proof for probable cause to a level resembling that required at trial. An "officer should not, however, be required to base a determination to arrest on the ability of the State to meet the standard of legal sufficiency for a conviction." *Id.* at 1035.

3. Other state and federal courts have recognized that circumstantial evidence alone may give rise to probable cause. *United States v. Edmiston*, 46 F.3d 786, 789 (8th Cir. 1995) ("If circumstantial evidence can be sufficient to prove the elements of a crime beyond a reasonable doubt, then *a fortiori* such evidence can be sufficient to establish probable cause for the issuance of a search warrant"); *United States v. Bell*, 833 F.2d 272, 277 (11th Cir. 1987) (finding probable cause to arrest three defendants for possession of marijuana despite lack of direct evidence that defendants actually possessed the marijuana seized by the police); *United States v. Snow*, 82 F.3d 935 (10th Cir. 1996) (no clear error in district court's finding of probable cause despite lack of direct evidence).[5] Most jurisdictions likely consider the proposition obvious enough that they do not need explicitly to state it. The recent rulings of the highest

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[5] *See also Coleman v. City of New York*, 177 F. Supp. 2d 151, 156 (S.D.N.Y. 2001) ("circumstantial evidence and inferences therefrom can suffice to support a finding of probable cause"); *Gibson v. State*, 758 So. 2d 782, 790 (La. 2000) (defendant can be convicted on circumstantial evidence alone and probable cause does not require direct, physical evidence); *State v. Kerr*, 511 N.W.2d 586, 589 (Wis. 1994) ("Although there was no direct evidence of [the defendant's] drug possession and no single circumstance that alone would justify the warrant, there was extensive circumstantial evidence that, taken together, justified the finding of probable cause"); *State v. Cox*, 45 N.W.2d 100, 103 (Wis. 1951) ("circumstantial evidence may constitute probable cause"); *DeVooght v. State*, 722 P.2d 705, 709 (Okla. Crim. App. 1986) (direct evidence "certainly is not required to prove probable cause"); *Owens v. County of Delaware*, 1996 WL 476616, at *15 (E.D. Pa. Aug. 15, 1996) (unpublished) ("a warrantless arrest need not be based on probable cause as established from direct evidence; police officers may arrive at such a conclusion on the basis of circumstantial evidence").

courts of Alabama, Colorado, and Maryland conflict with this authority, on a constitutional issue of significant public interest. As the State has urged in *Alabama v. Moffitt*, the conflict warrants this Court's attention.

B. The rulings of the Supreme Court of Alabama in this case and in *Moffitt* are so clearly erroneous that this Court might see fit to grant the writ of certiorari in both cases and summarily reverse.

As the State explained in its petition for certiorari in *Alabama v. Moffitt*, No. 02-327, this Court may view the majority rule as so obvious and this Court's own Fourth Amendment precedents as so clear that it is inclined to dismiss the rulings of the Alabama, Colorado, and Maryland Supreme Courts as aberrant and to a certain extent confined by the facts in each case. If so, this Court would be justified in granting certiorari and summarily reversing the ruling of the Supreme Court of Alabama. If not, this Court would be justified in granting certiorari and calendaring this case for consideration in the ordinary course.

The rationale of the Supreme Court of Alabama in *Moffitt*, if read seriously and taken to its logical conclusion, will paralyze the police in the performance of their public duties. The police on the street are typically called upon to act quickly and decisively in response to uncertain and unfolding factual scenarios. They will not be able to pursue suspects as readily and respond to emergency dispatches as forthrightly if they are not allowed to connect the dots as Officer Watkins did in this case. The ruling of the Supreme Court of Alabama in *Moffitt* – and of the Colorado Supreme Court in *King* and the Court of Appeals of Maryland in *Pringle* – imposes an unrealistic, trial-like burden of

proof upon the police, who must do their jobs in real-world, non-courtroom situations that do not admit to lawyer-like reflection and recrimination.

CONCLUSION

For the foregoing reasons, this Court should grant the State's petition for a writ of certiorari in this case and also in *Alabama v. Moffitt*, No. 02-327, consolidate the cases, and accept briefing and argument in both cases together. The error of the rulings in both cases is so apparent that this Court may see fit to summarily reverse the Supreme Court of Alabama.

Respectfully submitted,

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December 3, 2002

SUPREME COURT of ALABAMA

Ex parte Sedina Lashay BRYANT

Sedina Lashay Bryant
v.
State of Alabama

1011111

Sep. 6, 2002

WOODALL, Justice.

Sedina Lashay Bryant was convicted of unlawful possession of a controlled substance (i.e., cocaine), a violation of § 13A-12-212(a), Ala. Code 1975. The Court of Criminal Appeals affirmed the judgment of the trial court in an unpublished memorandum. *Bryant v. State*, (No. CR-00-1272, January 25, 2002) ___ So. 2d ___ (Ala. Crim. App. 2002) (table). The Court of Criminal Appeals overruled Bryant's application for rehearing on February 22, 2002, the same day this Court released its opinion in *Ex parte Moffitt*, [Ms. 1001739, February 22, 2002] ___ So. 2d ___ (Ala. 2002). We granted Bryant's petition for certiorari review, because the Court of Criminal Appeals' opinion conflicts with this Court's decision in *Moffitt*. We reverse and remand.

Kenneth Edward Moffitt and Bryant were both convicted of unlawful possession of cocaine arising out of the same circumstances. An officer discovered and seized the cocaine pursuant to a warrantless entry into an apartment shared by Moffitt and Bryant. The facts surrounding the officer's warrantless entry into the

apartment were stated in *Moffitt*; we will not repeat them. In *Moffitt*, we held that the warrantless entry was unlawful because, [a]fter reviewing the undisputed facts, we conclude[d] that the State did not carry its burden to show the existence of probable cause." *Moffitt*, ____ So. 2d at ____. Therefore, we held that the trial court had erred in denying Moffitt's motion to suppress the evidence of the cocaine, and that the Court of Criminal Appeals had erred in affirming the trial court's judgment.

Bryant filed a motion to suppress the *same cocaine* evidence, which, she argued, was seized pursuant to an illegal warrantless entry into her apartment. For the same reasons expressed in *Moffitt*, we must conclude that the trial court erred in denying Bryant's motion to suppress the cocaine evidence, and that, therefore, the Court of Criminal Appeals erred in affirming the trial court's judgment. The judgment of the Court of Criminal Appeals is reversed, and this case is remanded for an order or proceedings consistent with this opinion.

REVERSED AND REMANDED.

Houston, See, Lyons, Johnstone, and Harwood, JJ., concur.

Moore, C.J., and Brown and Stuart, JJ., dissent.

COURT of CRIMINAL APPEALS of ALABAMA

Sedina Lashay BRYANT
v.
STATE

CR-00-1272

January 25, 2002

MEMORANDUM

McMILLAN, Presiding Judge

The appellant was found guilty of unlawful possession of cocaine. The trial court sentenced her to one year and one day's imprisonment and ordered her to pay a fine, a victim's compensation assessment, court costs and $1,000 penalty under the Drug Demand Reduction Act.

The State's evidence at trial tended to show the following:[1] At approximately 3:20 a.m. on June 10, 2000, Dothan police officer Lynn Watkins received a "shots fired" dispatch to the Johnson Homes apartments. When he and his auxiliary officer arrived, a group of three of four people were gathered outside, yelling. One black male "took off running" from the group, and the appellant and her brother pointed to the man while the group yelled, "[T]here he goes." Watkins chased the man and saw him enter the rear door of Apartment 148. Watkins positioned himself at the doorway, and the auxiliary officer went to the front. The officers waited two or three minutes for back-up

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[1] The Court deferred its ruling on the appellant's motion to suppress and considered all of the available evidence.

assistance to arrive during which time the appellant's brother approached Watkins and told him that the man who had fled had a gun. When the back-up officer arrived, he announced that they were police officers and told the suspect to give himself up. The officer and Watkins then entered the apartment and checked the kitchen, hall, living room, hall closet, and bathroom. When they entered the master bedroom, they saw what appeared to be crack cocaine sitting on and around a television set. The back-up officer remained with the contraband while Watkins checked the final room. There he found the appellant's three or four-year old son sitting on a bed and the suspect Kenneth Moffett, hiding underneath. After Watkins removed the child and placed Moffet under arrest, the appellant told him that Apartment 148 was hers and Moffet was staying with her. Watkins then placed the appellant under arrest for possession of cocaine. No gun was found on Moffet or on the appellant's brother.

The evidence for the defense included the following: Neighbor, Tamela Wilson went outside when she heard the appellant's brothers and Kenneth Moffett engaging in a verbal altercation. The exchange continued, and the appellant, who also was outside, yelled, "[S]omebody call the police, [she] said, he got [sic] a gun." Wilson's daughter called 911 and told the dispatcher that "Edward Bryant" [the appellant's brother] had a gun.[2] When the police arrived, Wilson, the appellant and the appellant's brother were outside and Moffet was inside Apartment 148. The appellant testified that her brother was Tamela Wilson's boyfriend. Kenneth Moffet came to Apartment 148

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[2] The 911 tape was offered in evidence by the defense. The tape also was provided to this court on appeal.

about 3:00 a.m. and her brother arrived a few minutes later. The men exchanged words and then proceeded outside, where they continued to argue and her brother threatened to shoot Moffet. She was outside with her brother and Tamela Wilson when the police arrived, and Moffet had already returned to the apartment. Officer Watkins went directly to her back door and told her to get back when she tried to tell him who had the gun.

I.

The appellant contends that the trial court erred in refusing to suppress the evidence found her apartment because, she says, it was illegally seized in a warrantless search. She argues that, under the exigent circumstances exception, the State was required to prove both probable cause and exigent circumstances but failed to do so. The appellant cites numerous cases and Rule 4.1(a)(1), Ala. R. Crim. P., which addresses warrantless arrests or warrantless entries to make arrests. However, those citations are not applicable in the present case.

A warrantless search is per se unreasonable unless it falls within one of the following exceptions to the warrant requirement: (1) plain view; (2) consent; (3) incident to a lawful arrest; (4) hot pursuit or emergency; (5) probable cause coupled with exigent circumstances; stop and frisk situations; and (7) inventory searches. *Bivins v. State*, 710 So.2d 521 (Ala. Crim. App, 1997). Here, Officer Watkins's entry and search were justified under the probable cause plus extent circumstances exception. The officer then could seize the cocaine he saw in the appellant's bedroom under a different exception, plain view. Evidence in plain view may be seized if the officer has prior

justification for the intrusion, comes upon the evidence inadvertently, and immediately recognized it as evidence or wrongdoing. *Herrin v. State*, 349 So. 2d 103 (Ala. Crim. App. 1977).

With regard to the initial entry and search, "[p]robable cause exits where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense had been or is being committed." *Gains v, State*, 429 So. 2d 630, 632 (Ala. Crim. App. 1982). "Exigent circumstances exist when officers are faced with a situation where the immediate safety of the public is threatened. *Landreth v. State*, 600 So. 2d 440, 444 (Ala. Crim. App. 1992). An officer's compelling need to protect to constitutional rights, so long as the action taken to remove the threat is reasonable. *Id.* Here, Officer Watkins had information that shots had been fired at an apartment complex. It was undisputed that the shooting violated a Dothan city ordnance. When Watkins subsequently saw the shooting suspect flee into an apartment he had reason to believe that the man had broken into an apartment armed with a deadly weapon and that the man could shoot bystanders, officers, or someone in the apartment.

In *Landreth v. State*, supra, the warrantless entry of a residence was justified in order to seize a rifle the defendant had just used in a killing. In *A.A.G. v. State*, 668 So. 2d 122 (Ala. Crim. App. 1995), a warrantless entry and search were justified when officers responded to burglary alarm and the person inside residence behaved suspiciously after they identified themselves. In both of these cases, as here, the officers could conduct the warrantless searches because they

believed that their own lives or lives of others were at risk. Compare *Strange v. City of Tuscaloosa*, 652 So. 2d 773 (Ala. Crim. App. 1994), in which a warrantless search was both justified because officers only had information that a man and a woman had entered the house after fighting in the street, and the officers were told that no one needed aid.

II.

The appellant contends that the trial court erred in allowing her conviction to stand because, she says, Officer Watkins presented perjured testimony. She argues that he falsely testified that he saw Moffett outside and saw him run into her apartment and, in addition, falsely testified that her bother was not named in the dispatch. She argues that the State should have known that Watkins testimony was false because officers should have interviewed eyewitness Wilson and the prosecutor should have reviewed the 911 tape.

In *Ex parte Frazier*, 562 So. 2d 560, 569-70 (Ala. 1989), the Alabama Supreme Court set out the standard to be used in granting a new trial on perjured testimony in non-death penalty case:

> "The trial court must be reasonably well satisfied 1) that testimony given by a witness at trial was false; 2) that there is a significance change that heard the jury heard the truth, it would have reached a different result; 3) that evidence tending to prove the witness's perjury has been discovered since the trial; and 4) that the evidence could not have been discovered before or during trial by the exercise of due diligence."

Here, Watkin's testimony with regard to Moffet's actions clearly differed from that of Wilson and the appellant. However, his testimony was consistent with the statement he and the appellant offered no evidence that the testimony was willfully false. A conflict in the evidence is a jury question. *Whitlow v. State*, 509 So. 2d 252 (Ala. Crim. App 1987). This Court will not disturb a jury verdict on conflicting evidence. *Dixon v. State*, 476 So. 2d 1236 (Ala. Crim. App. 1985).

With regard to the name of the shooter, there was no conflict in the evidence. The 911 tape established that the caller identified the shooter as "Edward Bryant." However, the tape did not show whether the dispatcher had included the name in the subsequent dispatch.[3] The tape was not inconsistent with Watkins' testimony that the dispatcher did not tell him who had the gun.

AFFIRMED.

Cobb, Baschab, Shaw, and Wise, JJ., concur.

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[3] The dispatcher did not testify at trial.

SUPREME COURT of ALABAMA

Ex parte Kenneth Edward MOFFITT

Kenneth Edward Moffitt
v.
State of Alabama

1001739

Feb. 22, 2002

WOODALL, Justice.

Kenneth Edward Moffitt was convicted of unlawful possession of a controlled substance (cocaine), a violation of § 13A-12-212(a), Ala. Code 1975. On appeal to the Court of Criminal Appeals, Moffitt presented the following arguments: that the trial court had erred in denying his motion to suppress the cocaine, because, he argued, the cocaine was seized during an illegal warrantless search; that the trial court had erred in denying his motion for a judgment of acquittal, because, he said, the State had failed to establish that he constructively possessed the cocaine; that the trial court had erred in denying his motion for a mistrial after the prosecutor had made statements indicating to the jury that Moffitt was in jail while he was awaiting trial; and that the trial court had erred in denying his *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986), motion. The Court of Criminal Appeals affirmed the judgment of the trial court in an unpublished memorandum. *Moffitt v. State* (No. CR-00-0574, May 18, 2001), --- So.2d ---- (Ala. Crim. App. 2001) (table). Moffitt petitioned this Court for certiorari review as to all claims except the Batson

claim. We granted Moffitt's petition. We reverse and remand.

Moffitt first argues that the trial court erred in denying his motion to suppress evidence (cocaine), which, he argues, was seized pursuant to an illegal warrantless entry into a private residence. The facts surrounding the officer's warrantless entry into an apartment were stated in the Court of Criminal Appeals' unpublished memorandum:

> Jerry Lynn Watkins, an officer with the Dothan Police Department, testified that, on June 10, 2000, at approximately 3:23 a.m., he responded to a dispatch that shots had been fired at the Johnson Homes apartment complex. As he arrived, he saw four people who appeared to be arguing standing outside behind the apartments. The people yelled for him to stop, and when he did, [Moffitt] started running. A male who was standing with the group said that [Moffitt] had a gun. Watkins explained that he followed [Moffitt] because he 'figured ... he would probably be pretty dangerous if he was out there shooting.' (R. 38.) [Moffitt] ran into the back door of an apartment, and Watkins followed shortly thereafter. He searched the kitchen, the living room, and the master bedroom, but [Moffitt] was not in any of those rooms. However, while he was looking for [Moffitt] in the master bedroom, he saw in plain view what appeared to be cocaine on top of and on both sides of a television. Finally, he went into the bedroom across the hall from the master bedroom, where he saw a small child who was sitting on a bed pointing under the bed. Watkins took the child off of the bed, lifted

> the bed, and found [Moffitt] on the floor under the bed.

Our conclusion regarding this first argument is dispositive of this case.

"[A] principal protection against unnecessary intrusions into private dwellings is the warrant requirement imposed by the Fourth Amendment [to the United States Constitution] on agents of the government who seek to enter the home for purposes of search or arrest." *Welsh v. Wisconsin*, 466 U.S. 740, 748, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984). It is well established that warrantless entries to residences are presumptively unreasonable.

> It is well settled that warrantless entries to and searches of a residence are presumptively unreasonable and that the burden is on the government to demonstrate exigent circumstances justifying a warrantless entry and search. *Welsh v. Wisconsin*, 466 U.S. 740, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984); *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980); *Landreth v. State*, 600 So. 2d 440 (Ala. Crim. App. 1992). To justify a warrantless entry and search, the state needs to show both the existence of probable cause and exigent circumstances. *United States v. Rodgers*, 924 F.2d 219 (11th Cir. 1991), *cert. denied*, 501 U.S. 1221, 111 S. Ct. 2834, 115 L. Ed. 2d 1003 (1991), *appeal after remand*, 981 F.2d 497 (11th Cir. 1993); *Etheridge v. State*, 414 So. 2d 157 (Ala. Crim. App. 1982).

A.A.G. v. State, 668 So.2d 122, 126 (Ala. Crim. App. 1995). "The establishment of probable cause requires

only that facts available to the officer at the moment of [entry] would warrant a person of reasonable caution to believe that the action taken by the officer was appropriate." *Id.* at 127.

The Court of Criminal Appeals held that probable cause existed to justify the officer's warrantless entry into the apartment to search for Moffitt. After reviewing the undisputed facts, we conclude that the State did not carry its burden to show the existence of probable cause. Therefore, the trial court erred in denying Moffitt's motion to suppress the cocaine evidence discovered following the unlawful warrantless entry.

Officer Watkins was sent to the Johnson Homes apartment complex, where gunshots were reported to have been fired. There is no evidence to indicate that he was given any information concerning the identity of the reported shooter. When he arrived at the apartment complex, Watkins saw four people, who appeared to be arguing, standing behind the apartments. The people yelled for Watkins to stop. When Watkins stopped, Moffitt, who was standing in the group, began to run. As Moffitt ran from the group, a male in the group told Watkins that Moffitt had a gun. There is no evidence indicating that anyone told Watkins that Moffitt had *fired* a gun. Watkins then ran after Moffitt, following him into an apartment. When asked why he entered the apartment, Watkins stated "[he] figured ... [Moffitt] would probably be pretty dangerous if he was out there shooting." (R. 38.) While searching the apartment for Moffitt, Watkins saw in plain view the cocaine that Moffitt sought to suppress.

When Watkins entered the apartment, the facts available to him were not sufficient to support a

reasonable belief that Moffitt had committed any crime. The State argues that Watkins "could have reasonably believed ... that Moffitt had committed the crime of attempted murder." (State's Brief, at 10.) However, this argument fails to acknowledge the fact that no one informed Watkins that Moffitt had fired a gun at another person or, for that matter, that he had fired a gun under any circumstance. While there was a basis for a reasonable suspicion that Moffitt was in possession of a gun, the mere possession of a gun is not a crime, and there is no evidence that Watkins was aware of any fact indicating that it was unlawful for Moffitt, in particular, to possess a gun. While the State argues that "[a]t the very least, the [officer was] aware that the alleged crime Moffitt had committed involved a gun" (State's Brief, at 10), it is undisputed that Moffitt had not been accused by anyone of committing any crime before Watkins made the warrantless entry into the apartment.

The trial court erred in denying Moffitt's motion to suppress the cocaine evidence. Therefore, the Court of Criminal Appeals erred in affirming its judgment. The judgment of the Court of Criminal Appeals is reversed, and this case is remanded for an order or proceedings consistent with this opinion.

REVERSED AND REMANDED.

HOUSTON, SEE, LYONS, JOHNSTONE, and HARWOOD, JJ., concur.

MOORE, C.J., and BROWN and STUART, JJ., dissent.

STUART, Justice (dissenting).

I respectfully dissent. I believe the Court of Criminal Appeals correctly decided this case. In its

unpublished memorandum in this case, that court stated:

> The appellant argues that the search was not legal because the officers did not have a warrant to search the apartment and because the exceptions to the warrant requirement allegedly did not apply in this case.
>
> > It is well settled that warrantless entries to and searches of a residence are presumptively unreasonable and that the burden is on the government to demonstrate exigent circumstances justifying a warrantless entry and search. *Welsh v. Wisconsin*, 466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984); *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); *Landreth v. State*, 600 So.2d 440 (Ala.Cr.App.1992). To justify a warrantless entry and search, the state needs to show both the existence of probable cause and exigent circumstances. *United States v. Rodgers*, 924 F.2d 219 (11th Cir.1991), cert. denied, 501 U.S. 1221, 111 S.Ct. 2834, 115 L.Ed.2d 1003 (1991), *appeal after remand*, 981 F.2d 497 (11th Cir.1993); *Etheridge v. State*, 414 So.2d 157 (Ala.Cr.App.1982).
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> > ....
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> > The establishment of probable cause requires only that facts available to the officer at the moment of search would warrant a person of reasonable caution to believe that the action taken by the officer was appropriate.

A.A.G. v. State, 668 So. 2d 122, 126-27 (Ala. Crim. App. 1995).

> "[T]he ultimate test for determining whether exigent circumstances exist justifying a warrantless entry 'is whether there is such a compelling necessity for immediate action as will not brook the delay of obtaining a warrant.'" *United States v. Cresta*, 592 F. Supp. 889, 901 (D. Maine 1984).... "The exigent circumstances . doctrine recognizes several common situations where the time consuming resort to a neutral magistrate for an arrest or search warrant is unnecessary, for example: hot pursuit, ... fleeing suspect, ... danger to arresting officer or the public from the suspect...." *United States v. Kreimes*, 649 F.2d 1185, 1192 (5th Cir. 1981) (citations omitted).
>
> *Musgrove [v. State]*, 519 So. 2d [565,] 572 [(Ala. Crim. App.), aff'd, 519 So.2d 586 (Ala. 1986), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 611 (1988)]. *See also Bush v. State*, 523 So. 2d 538 (Ala. Crim. App. 1988).

C.M.B. v. State, 594 So. 2d 695, 699 (Ala. Crim. App. 1991) (emphasis added [in Court of Criminal Appeals' unpublished memorandum]). Furthermore, an officer's belief that a suspect is carrying a weapon is a factor that may be considered in determining whether exigent circumstances exist for the purpose of making a warrantless entry. *Id.*

> In this case, Watkins had responded to a report that shots had been fired. When he arrived, [Moffitt] fled, and another person stated that [Moffitt] was armed with a gun. [Moffitt] entered an apartment, and Watkins, who was in hot pursuit of [Moffitt], subsequently entered the apartment. Therefore, both probable cause and exigent circumstances existed to justify Watkins's warrantless entry into the apartment to search for [Moffitt].

Viewing the evidence at the time of the incident in question rather than with the benefit of hindsight, I conclude that the police officer did not know when he pursued Moffitt whether he was faced with a menacing or a reckless endangerment (both misdemeanors) or with an attempted murder (a felony). Moffitt's flight from the scene when the police officer arrived was evidence indicating that he had committed some offense. Officer Watkins was informed that Moffitt had a gun, so he had reason to believe he was dangerous. As he was being chased by Watkins, Moffitt entered an apartment. Before he entered, Officer Watkins could not know who might be inside and what Moffitt might do to anyone who was inside. Officer Watkins's warrantless entry into the apartment was justifiable and lawful. Once he was inside and saw contraband in "plain view," his seizure of it was lawful. I would quash the writ of certiorari. Therefore, I must dissent.

COURT of CRIMINAL APPEALS of ALABAMA

Kenneth Edward MOFFITT
v.
STATE

CR-00-0574

May 18, 2001

MEMORANDUM

BASCHAB, JUDGE.

The appellant was convicted of unlawful possession of a controlled substance (cocaine), a violation of § 13A-12-212(a)(1), Ala. Code 1975. The trial court sentenced him, as a habitual offender, to serve a term of twenty-five years in prison. See § 13A-5-9(c)(1), Ala. Code 1975. It also imposed a $2,000 Demand Reduction Assessment Act fine. See § 13A-12-281, Ala. Code 1975. This appeal followed.

I.

The appellant argues that the trial court erroneously denied his motion to suppress cocaine law enforcement officers seized during an allegedly illegal search. (Issue I in the appellant's brief.) During the suppression hearing, Jerry Lynn Watkins, an officer with the Dothan Police Department, testified that, on June 10, 2000, at approximately 3:23 a.m., he responded to a dispatch that shots had been fired at the Johnson Homes apartment complex. As he arrived, he saw four people who appeared to be arguing standing outside behind the apartments. The people yelled for him to stop, and when he did, the appellant

started running. A male who was standing with the group said that the appellant had a gun. Watkins explained that he followed the appellant because he "figured... he would probably be pretty dangerous if he was out there shooting." (R. 38.) The appellant ran into the back door of an apartment, and Watkins followed shortly thereafter. He searched the kitchen, the living room, and the master bedroom, but the appellant was not in any of those rooms. However, while he was looking for the appellant in the master bedroom, he saw in plain view what appeared to be cocaine on top of and on both sides of a television. Finally, he went into the bedroom across the hall from the master bedroom, where he saw a small child who was sitting on a bed pointing under the bed. Watkins took the child off of the bed, lifted the bed, and found the appellant on the floor under the bed.

The appellant argues that the search was not legal because the officers did not have a warrant to search the apartment and because the exceptions to the warrant requirement allegedly did not apply in this case.

> It is well settled that warrantless entries to and searches of a residence are presumptively unreasonable and that the burden is on the government to demonstrate exigent circumstances justifying a warrantless entry and search. *Welsh v. Wisconsin*, 466 U.S. 740, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984); *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980); *Landreth v. State*, 600 So. 2d 440 (Ala. Cr. App. 1992). To justify a warrantless entry and search, the state needs to show both the existence of probable cause and exigent circumstances. *United States v.*

Rodgers, 924 F.2d 219 (11th Cir. 1991), cert. denied, 501 U.S. 1221, 111 S. Ct. 2834, 115 L. Ed. 2d 1003 (1991), *appeal after remand*, 981 F.2d 497 (11th Cir. 1993); *Etheridge v. State*, 414 So. 2d 157 (Ala. Cr. App. 1982).

...

The establishment of probable cause requires only that facts available to the officer at the moment of search would warrant a person of reasonable caution to believe that the action taken by the officer was appropriate.

A. A. G. v. State, 668 So. 2d 122, 126-27 (Ala. Crim. App. 1995).

> "[T]he ultimate test for determining whether exigent circumstances exist justifying a warrantless entry 'is whether there is such a compelling necessity for immediate action as will not brook the delay of obtaining a warrant.'" *United States v. Cresta*, 592 F. Supp. 889, 901 (D. Maine 1984).... "The exigent circumstances doctrine recognizes several common situations where the time consuming resort to a neutral magistrate for an arrest or search warrant is unnecessary, for example: hot pursuit, ... fleeing suspect, ... danger to arresting officer or the public from the suspect...." *United States v. Kreimes*, 649 F.2d 1185, 1192 (5th Cir. 1981) (citations omitted).

Musgrove [v. State], 519 So. 2d [565,] 572 [(Ala. Crim. App.), *aff'd*, 519 So. 2d 586 (Ala. 1986), *cert. denied*, 486 U.S. 1036, 108 S. Ct. 2024, 100 L. Ed. 2d 11(1988)]. *See also Bush v. State*, 523 So. 2d 538 (Ala. Crim. App. 1988).

C. M. B. v. State, 594 So. 2d 695, 699 (Ala. Crim. App. 1991) (emphasis added). Furthermore, an officer's belief that a suspect is carrying a weapon is a factor that may be considered in determining whether exigent circumstances exist for the purpose of making a warrantless entry. *Id.*

In this case, Watkins had responded to a report that shots had been fired. When he arrived, the appellant fled, and another person stated that the appellant was armed with a gun. The appellant entered an apartment, and Watkins, who was in hot pursuit of the appellant, subsequently entered the apartment. Therefore, both probable cause and exigent circumstances existed to justify Watkins' warrantless entry into the apartment to search for the appellant.

> As the officers' entry and search for the suspect was lawful, the incidental discovery of the contraband during the course of the search was likewise lawful under the "plain view" doctrine. *Coolidge v. New Hampshire* (1971), 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564. It is well settled that an object in plain view of an officer who lawfully is in a position to have that view is subject to seizure. *Harris v. United States* (1968), 390 U.S. 234, 88 S. Ct. 992, 19 L. Ed. 2d 1067. Montana has applied this principle and stated the rule in this language:
>
> > The rule is: Where there is prior justification for the police to search an area, and in searching the area, they inadvertently find incriminating evidence which they had no reason to anticipate, they may lawfully seize that incriminating evidence.

> *State v. Gallagher* (1973), 162 Mont. 155, 167, 509 P. 2d 852, 858.

Terry v. State, 469 So. 2d 1359, 1360 (Ala. Crim. App. 1985), *cert. denied*, 474 U.S. 826, 106 S. Ct. 84, 88 L. Ed. 2d 69 (1985) (quoting *State ex rel. Zander v. District Court of Fourth Judicial Dist., In and For Missoula County*, 180 Mont. 548, 591 P.2d 656, 659 (1979)).

> Under the plain view exception to the warrant requirement, an officer may seize evidence of a crime if he is legitimately on the premises where he views the evidence and if the incriminating nature of the evidence is "immediately apparent." *Williams v. State*, 527 So. 2d 764 (Ala. Crim. App. 1987). Where officers are lawfully on the scene investigating a crime and evidence is observed in plain view, that evidence may be lawfully seized, despite the absence of a search warrant. *Duck v. State*, 518 So. 2d 857 (Ala. Crim. App. 1987); *Smith*, supra; *Pearson v. State*, 356 So. 2d 776 (Ala. Crim. App. 1978).

Landreth v. State, 600 So. 2d 440, 445 (Ala. Crim. App. 1992) (footnote omitted). Because Watkins properly entered the apartment to search for the appellant, his discovery of the cocaine during the course of his search for the appellant was lawful under the plain view doctrine. Therefore, the trial court properly denied the appellant's motion to suppress the cocaine.

II.

The appellant also argues that the trial court erroneously denied his motion for a judgment of acquittal because the State allegedly did not establish

that he constructively possessed the cocaine. (Issue III in the appellant's brief.) Although he challenged the sufficiency of the evidence at the close of the State's case, he did not renew his challenge at the close of his case or in a motion for a new trial. Therefore, we will consider only the State's evidence in reviewing this contention. *See Burell v. State*, 680 So. 2d 975 (Ala. Crim. App. 1996).

> In reviewing the denial of a motion for judgment of acquittal, this court must determine whether any evidence tending to point to the accused's guilt was before the trial court when that motion was made. *LaBarber v. State*, 455 So. 2d 941 (Ala. Crim. App. 1984). In addition, the State's evidence must be received as true and must be viewed in a light that is most favorable to the State. *McConnell v. State*, 429 So. 2d 662 (Ala. Crim. App. 1983). Finally, the State must be accorded all legitimate inferences arising from the evidence presented. *White v. State*, 546 So. 2d 1014 (Ala. Crim. App. 1989).

Smith v. State, 601 So. 2d 201, 203 (Ala. Crim. App. 1992). Also,

> [c]ircumstantial evidence is not inferior evidence, and it will be given the same weight as direct evidence, if it, along with the other evidence, is susceptible of a reasonable inference pointing unequivocally to the defendant's guilt. *Ward v. State*, 557 So. 2d 848 (Ala. Cr. App. 1990). In reviewing a conviction based in whole or in part on circumstantial evidence, the test to be applied is whether the jury might reasonably find that the evidence excluded every reasonable hypothesis except that of

> guilt; not whether such evidence excludes every reasonable hypothesis but guilt, but whether a jury might reasonably so conclude. *Cumbo v. State*, 368 So. 2d 871 (Ala. Crim. App. 1978), *cert. denied*, 368 So. 2d 877 (Ala. 1979).

Ward, 610 So. 2d at 1191-92.

Lockhart v. State, 715 So. 2d 895, 899 (Ala. Crim. App. 1997).

> A person commits the crime of unlawful possession of controlled substance if:
>
> (1) Except as otherwise authorized, he possesses a controlled substance enumerated in Schedules I through V.

§ 13A-12-2 12(a)(1), Ala. Code 1975.

> In order to sustain a conviction for possession of controlled substances, there must be sufficient evidence of either actual or constructive possession. *Radke v. State*, 52 Ala. App. 397, 293 So. 2d 312 (1973), *aff'd*, 292 Ala. 290, 293 So. 2d 314 (1974). "Just as the mere presence of a person at the time and place of a crime is not sufficient to justify a conviction for the commission of that crime, so the mere presence of the accused in a place where the controlled substance is found is not in and of itself evidence of possession." German v. State, 429 So. 2d 1138, 1140 (Ala. Cr. App. 1982).

Menefee v. State, 592 So. 2d 642, 644 (Ala. Cr. App. 1991).

> When constructive possession is relied on, the prosecution must also prove beyond a reasonable doubt that the accused had knowledge of the presence of the controlled substances. *Campbell v. State*, [439 So. 2d 718 (Ala. Crim. App.), *rev'd on other grounds*, 439 So. 2d 723 (Ala. 1983)]; *Yarbrough V. State*, 405 So. 2d 721 (Ala. Crim. App.), *cert. denied*, 405 So. 2d [725] (Ala. 1981). This knowledge may be inferred from the accused's exclusive possession, ownership, and control of the premises. *Temple v. State*, 366 So. 2d 740 (Ala. Cr. App. 1978.) When the accused is not in exclusive possession of the premises, however, this knowledge may not be inferred unless there are other circumstances tending to buttress this inference. *Korreckt v. State*, 507 So. 2d 558 (Ala. Cr. App. 1986); *Temple v. State*, [366 So. 2d at 743]. While non-exclusive possession may raise a suspicion that all the occupants had knowledge of the contraband found, a mere suspicion is not enough. Some evidence that connects a defendant with the contraband is required. *Grubbs v. State*, 462 So. 2d 995 (Ma. Crim. App. 1984); *Temple v. State*.

Robinette v. State, 531 So. 2d 682, 686 (Ala. Crim. App. 1987), *rev'd on other grounds*, 531 So. 2d 697 (Ala. 1988).

In *Temple v. State*, 366 So. 2d 740 (Ala. Cr. App. 1978), this court provided a nonexclusive list of circumstances that may establish a connection between a defendant and the contraband found on the defendant's property

when the defendant is not in the exclusive possession of the premises.

> While the kinds of circumstances which may provide a connection between a defendant and the contraband are unlimited and will naturally depend on the facts of each particular case, 56 A.L.R.3d 948 (1974), it has generally been stated that:
>
> > The kinds and circumstances which provide such connection are: (1) evidence that excludes all other possible possessors; (2) evidence of actual possession; (3) evidence that the defendant had substantial control over the particular place where the contraband was found; (4) admissions of the defendant that provide the necessary connection, which includes both verbal admissions and conduct that evidences a consciousness of guilt when the defendant is confronted with the possibility that an illicit drug will be found; (5) evidence that debris of the contraband was found on the defendant's person or with his personal effects; (6) evidence which shows that the defendant, at the time of the arrest, had either used the contraband very shortly before, or was under its influence.
> >
> > The kinds of evidence which might be relevant, but which by themselves do not add the necessary connection are: (1) admissions of previous use; (2) conduct that might be construed as evidencing a consciousness of guilt which was not

> displayed upon the defendant's confrontation of the possibility that an illicit drug would be discovered; (3) evidence of previous use; (4) evidence that showed the defendant's physical proximity to the contraband.
>
> 9 Land and Water L. Rev. 236, 248-49 (1974).

366 So. 2d at 743.

Posey v. State, 736 So. 2d 656, 658-59 (Ala. Crim. App. 1997), *writ quashed*, 736 So. 2d 661 (Ala. 1999).

In addition to the facts previously stated in Part I of this memorandum, Watkins testified that approximately two to three minutes elapsed between the time the appellant entered the apartment and the time he located the appellant under the bed. He later learned that Sedina Bryant leased the apartment, that the appellant was her boyfriend, "that both of them stayed there," and that they both occupied the master bedroom where he found the cocaine. (R. 55.) Watkins further stated, "[B]oth of their clothes were in the master bedroom]. He had clothes in a duffel bag that [Bryant] said was his. And she had clothes on the floor, also. ... [The appellant's clothes] were in a bag in the floor." (R. 55.) Another officer testified that both men's and women's clothing, including pants that looked like they belonged to a man, were on the floor in the master bedroom. Watkins described the location of the cocaine as follows: "As soon as you walked into the room, the TV stand was on this wall to your left. It faced the bed. On top of the TV was like a clear ashtray that had what appeared to be crack-cocaine in it. And on each side of the TV, on the stand itself, there was some more crack-cocaine on the right-hand

and left-hand side. Some of it was in small bags, and the other was just laying out." (R. 61-62.) Another officer explained that the television stand had doors that open and slide back so that the television is visible. Forensic testing established that the substance the officers found in the master bedroom was cocaine. Finally, officers found a half-smoked marijuana cigarette in an ashtray on a dresser in the master bedroom. Based on this circumstantial evidence, the jury could have reasonably concluded that the appellant constructively possessed the cocaine. Accordingly, the appellant's argument is without merit.

III.

The appellant further argues that the trial court erroneously denied his motion for a mistrial after the prosecutor made statements that indicated that he was in jail during the time he was awaiting trial on the current charge. (Issue II in the appellant's brief.) During the State's cross-examination of Sedina Bryant, the following occurred:

> [PROSECUTOR:] [Y]ou had visited him in June, July, August, September, October, November and December -- many times visiting him while he's been in the jail. Correct?
>
> [WITNESS]: Yes, sir.
>
> [PROSECUTOR]: In fact, you visited with him Sunday, December the 10th, just before this trial. Correct?
>
> [DEFENSE COUNSEL]: I'm going to object -- the statement he was in jail.
>
> [PROSECUTOR]: I have a right to ask where she visited him.

THE COURT: Well, ladies and gentlemen, you should not consider the fact that the defendant is in jail. You probably know that some people make bond and some people don't.

[PROSECUTOR]: Only for visitation purposes. That's the only purpose that I offered that she went to visit him, was to show some type of bias. That's the only reason I'm asking.

[DEFENSE COUNSEL]: Judge, we established bias on the Direct Examination. We established relevance -- the relationship they have.

THE COURT: I'll overrule the objection. I don't think the - - it's that big of a secret to the jury.

[DEFENSE COUNSEL]: We would move for a mistrial.

THE COURT: I will deny the motion.

(R. 98-99.)

> "A motion for mistrial should not be granted where the prejudicial qualities of the comment can be eradicated by action of the trial court." *Nix v. State*, 370 So. 2d 1115, 1117 (Ala. Cr. App.), cert. denied, 370 So. 2d 1119 (Ala. 1979) (quoted in *Henry v. State*, 468 So. 2d 896, 901 (Ala. Cr. App. 1984), cert. denied, 468 So. 2d 902 (Ala. 1985))....
>
> Moreover, a mistrial "specifies such fundamental error in a trial as to vitiate the result." *Diamond v. State*, 363 So. 2d 109, 112 (Ala. Crim. App. 1978), and should be granted only when a "high degree of

> 'manifest necessity'" is demonstrated. *Wadsworth v. State*, 439 So. 2d 790, 792 (Ala. Crim. App. 1983), *cert. denied*, 466 U.S. 930, 104 S. Ct. 1716, 80 L. Ed. 2d 188 (1984). It is well-settled that "the granting of a mistrial is within the sound discretion of the trial [judge], for he, being, present, is in a much better position to determine what effect, if any, some occurrence may have upon the jury's ability to decide the defendant's fate fairly and justly." *Shadle v. State*, 280 Ala. 379, 384, 194 So. 2d 538, 542 (1967). Absent clear abuse, this court will not disturb the trial court's exercise of that discretion. *Wadsworth v. State*, 439 So. 2d at 792....
>
> *Garnett v. State*, 555 So. 2d 1153, 1154-55 (Ala. Crim. App. 1989) (the victim's reference to a prior act of violence by the defendant, which had apparently resulted in her arrest did not require a mistrial where the trial judge instructed the jurors to disregard the testimony).

Eaton v. State, 759 So. 2d 562, 565 (Ala. Crim. App. 1999).

> When, as here, a trial court immediately charges the jury to disregard improper remarks, there is a prima facie presumption against error. *Elmore v. State*, 414 So. 2d 175 (Ala. Crim. App. 1982); *Kelley v. State*, 405 So. 2d 72.8 (Ala. Crim. App.), cert. denied, 405 So. 2d 731 (Ala. 1981); *Chambers v. State*, 383 So. 2d 632 (Ala. Crim. App.), cert. denied, 382 So. 2d 636 (Ala. 1980); *Nix v. State* 370 So. 2d 1115

(Ala. Crim. App.), cert. denied, 370 So. 2d 1119 (Ala. 1979).

> Where a trial court acts promptly to impress upon the jury that improper questions are to be disregarded by them in their deliberations, the prejudicial effects of such remarks are removed. *Minor v. State*, 402 So. 2d 1121 (Ala. Crim. App. 1981); Grey v. State, 369 So. 2d 889 (Ala. Crim. App. 1979); *Brown v. State*, 366 So. 2d 334 (Ala. Crim. App. 1978); *Woods v. State*, 344 So. 2d 1225 (Ala. Crim. App.), *cert. denied*, 344 So. 2d 1230 (Ala. 1976). Even "inadvertent slips" which are prejudicial to a defendant need not be cause for a mistrial where the judge acts promptly to impress upon the jury that improper statements are not to be considered by them. *Richardson v. State*, 374 So. 2d 433 (Ala. Crim. App. 1979); *Elmore, supra*.
>
> The actions of the trial judge were prompt in this case. The matter was not so prejudicial that it could not be erased from the minds of the jury. In such a case, the right to declare a mistrial rests in the sound discretion of the presiding judge.

Woods v. State, 460 So. 2d 291, 295 (Ala. Crim. App. 1984).

In this case, the prosecutor did not in any way indicate that the appellant was in jail on any charge other than the one for which he was being tried. Therefore, the questions did not create a situation in which a mistrial was a manifest necessity. *See Stanton V. State*, 648 So. 2d 638 (Ala. Crim. App. 1994). Also, the trial court immediately instructed the jury not to consider that the appellant was in jail. In addition, it

specifically instructed the jury that some people are able to get out of jail on bond after they are arrested and some are not. The trial court's prompt instructions to the jury were sufficient to eradicate any prejudice to the appellant. *See Harrell V. State*, 608 So. 2d 434 (Ala. Crim. App. 1992); *Woods*, supra. Consequently, the trial court properly denied the appellant's motion for a mistrial.

IV.

Finally, the appellant argues that the trial court improperly denied his *Batson* [*v. Kentucky*, 476 U.S. 79,106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)] motion. (Issue IV in the appellant's brief.) After the jury had been struck, but before it was sworn, the following occurred:

> THE COURT: We can do our Batson motion. Okay, [defense counsel].
>
> [DEFENSE COUNSEL]: Your Honor, the defense would challenge the strikes under the Batson of two jurors ... 107... and ... 179. I admit, Judge, they both testified that they knew one of the defense witnesses, Ms. Bryant. But they both testified that that would not influence their impartiality. I also know, Judge, that the State did also strike another -- a third African-American, ... 101. I would, for the record --I can understand why she would be struck, as she admitted that she had pled guily to a felony charge, I believe, in 1995.
>
> THE COURT: What was the sequence of the State's strikes, in regard to numbers 107 and 179?

[DEFENSE COUNSEL]: I believe, Judge, they -- I would assume they were struck, because they both testified that they knew either Ms. Bryant would be a State's witness or Ms. Bryant's family. But they also testified, Judge, that the fact that they either knew her or her family would not affect their impartiality as jurors.

THE COURT: Which strike was number 107?

[PROSECUTOR]: It was our third strike. Our third strike was number 107. Our fourth strike was number 179. Judge, the facts that he's giving you aren't correct. [Defense counsel] has just alleged to the Court what 179 said -- Larry Griggs said that he knew the defendant's -- co-defendant's father and said that -- Ms. Bates asked him, Do you know him -- What kind of person is he in the community?

Well, he is a good guy.

Would you tend to believe his daughter, who is the co-defendant, who the defense plans to call that they've subpoenaed?

And the Court is aware of that, and he said he would tend to believe her, that she was a good person.

So, based on that, that's clearly enough to strike. Second, 107 that we struck was the male. Once again, he says that -- the female. Excuse me.

[ASSISTANT PROSECUTOR]: Said she had known the co-defendant since she was a baby. Had known her all her life.

> [PROSECUTOR]: And, you know, once again, that's a race-neutral reason. Just because she says she can be fair, we've shown that she knew them. She didn't come up -- she didn't come up on time. She came up after we had already started striking. All the other witnesses -- I mean, jurors came up immediately. But because she knows the co-defendant, that's clearly a nonracial reason -- the family member the defense plans to call. We struck [number 101]. And [defense counsel] said there was reasons for us to strike her, and so, I do not feel we have to answer on her. But if you do, we will.
>
> THE COURT: I think those are race-neutral reasons. They are not strikes for cause, but I think they are peremptory strike reasons. So, I will deny the Batson motion."

(R. 30-33.)

The appellant contends that the State did not articulate a race-neutral reason for striking prospective jurors 107 and 179. However, both prospective jurors indicated that they knew Sedina Bryant, who was the appellant's girlfriend and a witness for the defense. "[W]e have held that strikes based on the fact that the veniremember knew or was acquainted with witnesses subpoenaed by the defense are race-neutral. *Bass v. State*, 585 So. 2d 225, 237 (Ala. Crim. App. 1991); *Davis v. State*, 555 So. 2d 309, 314 (Ala. Crim. App. 1989)." *Wilsher v. State*, 611 So. 2d 1175, 1182 (Ala. Crim. App. 1992). Therefore, the State's reason for striking prospective jurors 107 and 179 was race-neutral.

The appellant further contends that the State's reason for striking prospective jurors 107 and 179 was not sufficient because both prospective jurors stated that the fact that they knew Bryant would not affect their ability to be fair.

> [A] veniremember whose "acquaintance with [a] party or relative [or witness] is such that it would result in a probable prejudice" is subject to challenge for cause. *Vaughn v. Griffith*, 565 So. 2d 75, 77 (Ala. 1990), cert. denied, 498 U.S. 1097, 111 S. Ct. 987 [112 L. Ed. 2d 1072] (1991). However, a prosecutor's explanation for his exercise of a peremptory strike "need not rise to the level of a challenge for cause." *Ex parte Branch*, 526 So. 2d 609, 623 (Ala. 1987). It was thus unnecessary in this case for the prosecution to establish that the veniremembers' acquaintance with the appellant or [his] witnesses was "such that it would result in probable prejudice."
>
> [*Wilsher v. State*,] 611 So. 2d [1175,] 1182 [(Ala. Cr. App. 1992)].

Jones v. State, 623 So. 2d 389, 392 (Ala. Crim. App. 1993). Because a prosecutor's reasons for striking prospective jurors are not required to rise to the level of a challenge for cause, the appellant's argument is without merit.

For the above-stated reasons, we affirm the trial court's judgment.

AFFIRMED.

McMillan, P.J., and Cobb, Shaw, and Wise, JJ., concur.